IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2016 of 2001
with
Civil Application No.4986 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

INDIACOM DIRECTORIES LTD.

Versus

BHARAT SANCHAR NIGAM LTD.

Appearance:
Mr. P.M. Thakkar, Senior Advocate for
M/S THAKKAR ASSOC. for Petitioner No. 1
MR DN PATEL for Respondent No. 1
RULE SERVED for Respondent No. 2
RULE UNSERVED for Respondents No. 3-4

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 15_/02/2002

C.A.V. JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. First Appeal No.2016 of 2001 is filed by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996 ('Act' for short) read with Section 96 of the Code of Civil Procedure, 1908 ('Code' for short), challenging the judgment and order dated March 27, 2001 passed by the learned Judge, Court No.12, City Civil Court, Ahmedabad, in Arbitration Application No.310 of 2000, by which judgment and order, the learned City Civil Judge has set aside the award dated November 16, 1999 passed by the respondent No.2 (sole arbitrator) by holding that the award was unreasonable, without jurisdiction and bad in the eye of law. Civil Application No.4986 of 2001 is filed by the applicant-appellant to stay the implementation, operation and execution of judgment and order dated March 27, 2001 passed by the learned Judge, Court No.12, City Civil Court, Ahmedabad, in Arbitration Application No.310 of 2000.

2. The General Manager, Ahmedabad Telecom District, had issued a tender on March 25, 1994 for printing and supply of English Telephone Directory with yellow pages on turn key basis. The bids were opened on April 29, 1994 in which the appellant-original claimant had also participated. After evaluation of the tenders, it was decided by the Ahmedabad Telecom District to award contract to the appellant. An agreement was entered into between the General Manager, Ahmedabad Telecom District, Ahmedabad, and the President of Sesa Seat Information System Limited (appellant) on September 15, 1994. As per the said agreement, the appellant was to procure papers, collect advertisement, print, bind and supply number of copies of Telephone Directory to the General Manager, Ahmedabad Telecom District, for five years, i.e. 1994 to 1998 with yellow pages and supplementary directory for each issue except for the year 1994. As per the said agreement, the appellant was to supply to the Department free of cost following number of printed telephone directory during the period of contract.

Year of Issue	Number of Copies
1994	2,00,000
1995	2,30,000
1996	2,64,500

1997	3,03,900
1998	3,49,400

The above figures were tentative and had been arrived at by 15% increase on DEL's (Direct Exchange Lines) demand and the appellant was to be intimated by the General Manager, Ahmedabad Telecom District, in advance before commencement of work of each issue. Thus, the appellant was to supply telephone directory as per the terms and conditions stated in the agreement and as consideration the appellant was allowed to procure advertisement and to print them on yellow pages to the main telephone directories as specified under the general terms and conditions of the agreement. Further, the appellant was allowed to procure and print super bold entries, strip advertisement, and cover pages advertisement as per the terms and conditions mentioned in the agreement. In return, the appellant agreed to pay a fixed amount towards royalty, as mentioned hereinbelow:-

A) Amount of Royalty

Year of Issue	Amount
1994	Rs.3 lakhs
1995	Rs.63 lakhs
1996	Rs.153 lakhs
1997	Rs.207 lakhs
1998	Rs.285 lakhs
	Rs.711 lakhs

B) Revenue Share from Super Bold entries

Year of Issue	Amount in percentage
1994	1%
1995	3%
1996	5%
1997	10%
1998	20%

Thus, as per the agreement, the aforesaid amount was payable in the form of cash or demand draft from the date of completion of delivery of the printed directories as per the time schedule mentioned in the Schedule "A" of the agreement irrespective of the income from the advertisement. As per the agreement, the appellant was to furnish a bank guarantee for a sum of Rs.60 lakhs for the entire period of agreement plus one year thereafter.

Thus, it appears from the agreement that the appellant was to pay a fixed amount towards royalty from the yellow pages. It was to be increased every year. The appellant had brought out 1994-1995 and 1995-1996 directories with yellow pages as per the agreement. So far as the remaining two years 1997 and 1998 are concerned, the appellant had not brought out any directory as per the agreement and, by representation dated April 13, 1996, it was requested by the appellant for reduction of amount of royalty from yellow pages. Thereafter, the appellant had approached the High Court by way of filing Special Civil Application No.10658 of 1996. The High Court, after hearing the parties, had passed an order directing the appellant to make representation afresh to the Principal General Manager, Ahmedabad Telecom District, for redressal of its grievances and the Principal General Manager was directed to decide and dispose of the representation in accordance with law as early as possible. The aforesaid Special Civil Application was accordingly permitted to be withdrawn. Thereafter, in pursuance of the above order passed by the High Court, the appellant made representation on January 6, 1997 for review of the terms and conditions of the telephone directory agreement and prayed for reduction of royalty payable by the appellant from Rs.153 lakhs to Rs.92 lakhs for the year 1996 (3rd) issue, from Rs.207 lakhs to Rs.119 lakhs for the year 1997 (4th) issue, and from Rs.285 lakhs to Rs.171 lakhs for the year 1998 (5th) issue. The appellant further made a request in the said representation that the appellant may be permitted to supply 85% of copies of directory required for the respective remaining issues and the remaining 15% of copies of directory will be supplied to the Department free of cost if the demand is placed by the Department. The representation made by the appellant was turned down by the Department by its reply dated January 29, 1997 having found that whenever there is a long term agreement, the parties to the agreement must have considered the changes taking place in the society which may include liberalisation of economy, opening of telephone sector for private operators, interpretation of various laws and their implementation and also after considering other relevant aspects of the agreement. It was found that there was no justification whatsoever to review the terms and conditions of the agreement dated September 15, 1994 and the appellant was again requested to bring out the 3rd issue of telephone directory.

3. Thereafter, the appellant served a legal notice dated January 27, 1998 to the Department of Telecommunication, New Delhi, and requested for the

appointment of an arbitrator with reference to the agreement dated September 15, 1994, with a request for reduction of royalty of each of the respective years beginning from 1996 to 1998. Thereafter, the appellant approached the High Court by way of Arbitration Application No.14 of 1998 for the appointment of an arbitrator under section 11 of the Act. The High Court by order dated August 28, 1998 referred the dispute to the sole arbitrator i.e. respondent No.2, with direction to give a decision as expeditiously as possible and the arbitrator was also directed that he may give reasons in support of the decision. Thereafter, the appellant had submitted his claim under section 23(1) of the Act before the sole arbitrator, i.e. respondent No.2 herein. The Department filed objections against the above claim petition and stated that there is no dispute pending and that the claim of the appellant for reduction of royalty is not justifiable. It was also contended on behalf of the Department that there was no condition in the agreement and/or assurance on behalf of the Ahmedabad Telecom District that the appellant would be the only person for procuring advertisements for publication of yellow pages and there was no assurance whatsoever that no other person would come out with yellow pages. The appellant had also filed counter reply to the objections filed by the Ahmedabad Telecom District.

4. Thereafter, the sole arbitrator had passed award dated November 16, 1999 to the effect that the appellant shall publish and supply 2,31,000 copies of directory of the year 1999 (4th issue) and 2,70,000 copies of directory of year 2000 (5th issue) free of cost. It was further ordered that the Ahmedabad Telecom District shall purchase the remaining copies from the appellant at the cost price of each copy, i.e. the actual price of publishing of each copy. It was further ordered that royalty of 1 lakh each year shall be paid by the appellant to the Ahmedabad Telecom District and also passed an order that out of the white pages revenue 80% shall be the share of the appellant and 20% that of the Ahmedabad Telecom District and the sole arbitrator has further ordered that royalty for the year 1996-97 shall be modified from Rs.153 lakhs to Rs.92 lakhs.

5. Being aggrieved with the aforesaid award dated November 16, 1999, the Ahmedabad Telecom District filed Arbitration Petition No.IAAP/3/2000 in the High Court. The aforesaid petition came up for hearing before the Honourable the Chief Justice, and the Honourable the Chief Justice on March 31, 2000 passed the following order:-

"There is a preliminary objection raised on behalf of the respondents that this application under Section 34 of the Arbitration and Conciliation Act, 1996 is not maintainable in this Court. The objection is sustained. The application under Section 34 of the Act has to be filed before the Principal Civil Court within whose jurisdiction cause of action arises. In these circumstances, the application is disposed of as not maintainable before the Chief Justice of this Court. The petitioner is, however, given liberty to approach the appropriate Civil Court and as and when the application is filed, the Civil Court shall take it up for decision within a reasonable time."

6. After passing of the order dated March 31, 2000 by the Honourable the Chief Justice in Arbitration Petition No.IAAP/3/2000, Bharat Sanchar Nigam Limited and the Directory Officer of the Bharat Sanchar Nigam Limited filed Arbitration Application No.310 of 2000 in the City Civil Court, Ahmedabad, to set aside the award of the arbitrator dated November 16, 1999, on various grounds mainly being that the arbitrator had travelled beyond the scope of the reference and had virtually modified the terms and conditions of the agreement dated September 15, 1994. The application for setting aside the award was contested by the appellant, inter alia, contending that, at the time of entering into the agreement, both the Department and the appellant were aware that the appellant would be having a monopolistic right to collect the advertisement for yellow pages in Ahmedabad, which view was supported by the decision of the Division Bench of the Bombay High Court in the case of Tata Press vs. Mahanagar Telephone Limited, reported in AIR 1995 Bombay 107. It was contended that, in view of the decision of the Division Bench of the Bombay High Court, as referred to above, the appellant had offered handsome royalty figures to the Bharat Sanchar Nigam Limited. Thereafter, the appellant had satisfactorily performed the agreement for the year 1994-1995 and had issued directories along with yellow pages as per the terms and conditions of the agreement. It was contended that the decision of the Bombay High Court was challenged before the Supreme Court and the Supreme Court, in an appeal filed by the Tata Press, in the reported decision in AIR 1995 Supreme Court 2438 [Tata Press vs. Mahanagar Telephone Limited], had allowed the appeal by setting aside the decision of the Division Bench of the Bombay High Court by holding that it was not necessary that the official contractor of telephone directory would have the prerogative of collecting and printing advertisement for yellow pages.

It was submitted that rights of the contractor were held not to be monopolistic and such rights were held to be against the fundamental right of Article 19(1)(a) of the Constitution of India. It was, therefore, contended by the appellant before the City Civil Court that the said ruling of the Supreme Court had a gigantic impact on the agreement dated September 15, 1994 in as much as it converted the monopolistic status of the appellant to a competitive one and, on account of the said judgment, the future part of the agreement dated September 15, 1994 became impossible to perform in fact and in law. It was submitted by the appellant that, as soon as the implications of the said judgment were realised, the appellant made a representation to the Department, i.e. Department of Telecommunication, in order to modify certain conditions of the said agreement in order to make it performable. It was contended that the Department of Telecommunication had rejected the said representation and, thereafter, the appellant had approached the High Court by filing Special Civil Application No.10658 of 1996 wherein the High Court had directed the appellant to make a detailed representation before the authority concern and, accordingly, a detailed representation was made, but the Department did not consider the said representation in the true spirit. It was further submitted that, in spite of the same, the appellant had printed the third issue, i.e. 1996, of the directory, while reserving necessary rights for resolving the said dispute as per the law. It was contended that, as the appellant was left with no other alternative but to refer the dispute to the arbitration as per the clause 21 for arbitration contained in the agreement dated September 15, 1994. The Honourable the Chief Justice by order dated August 28, 1998, in Arbitration Petition No.14 of 1998, had appointed respondent No.2 as sole arbitrator by referring the dispute to him. It was denied that the respondent no.2, sole arbitrator, who is General Manager of Department of Telecommunication, had modified the award beyond the scope of the terms of the reference. It was stated that the sole arbitrator had decided the claim put forward by the appellant in accordance with law and, therefore, it was prayed by the appellant that the application for setting aside the award be dismissed.

7. The learned Judge, Court No.12, City Civil Court, Ahmedabad, after hearing the arguments of the respective parties at length, came to the conclusion that the arbitrator had travelled beyond scope of the reference and had modified the terms and conditions of the agreement by decreasing the amount of royalty. It was further observed by the learned trial Judge that, after

conclusion of the arguments before the sole arbitrator, the appellant had tendered a fresh proposal on February 17, 1999, and the Arbitrator, while acting on the fresh proposal, had passed the award by directing the appellant to pay Rs.1 lakh as royalty for 4th and 5th issues of directory and directed the appellant to supply 1,42,000 copies of the 4th issue and 1,15,000 copies of the 5th issue free of cost and to supply the balance directory at the rate of Rs.126 per directory for 4th issue and Rs.144/per directory for 5th issue and also had reduced royalty from Rs.155 lakh to Rs.92 lakh for 3rd issue. The learned Judge, in light of the above facts, held that the Department was not given proper opportunity to present their case and in absence of any notice regarding arbitral proceedings they were otherwise unable to present their case and in light of Section 34 sub-clause 2(a)(iii) in such circumstances, the Court is empowered to set aside the arbitral award. The learned trial Judge has, further, held that the award passed by the respondent No.2, sole arbitrator, is beyond the scope of the agreement in view of the provisions contained in Section 34 sub-clause 2(a)(iv) read with Section 28 sub-clause 3 of the Act and, therefore also, the arbitral award requires to be quashed and set aside. On the basis of above-stated reasons, the learned trial Judge has allowed the application filed by the Department by setting aside the award dated November 16, 1999 passed by the respondent No.2, sole arbitrator, which has given rise to filing of this First Appeal by the appellant.

8. Learned Senior Advocate, Mr. P.M.Thakker for the appellant and learned Senior Standing Counsel, Mr. D.N.Patel, for the department have taken us through the entire record and proceedings of the First Appeal as well as the proceedings before the sole arbitrator.

9. It has been contended by learned Senior Advocate, Mr. P.M.Thakker, for the appellant that the application filed by the Department under Section 34 of the Act for setting aside the award of the sole arbitrator was barred by the period of limitation as provided under Section 34 sub-section (3) of the Act. He has submitted that the respondent No.2, the sole arbitrator, had passed his award on November 16, 1999 and a copy of the said award was received by the office of the Ahmedabad Telecom District on December 6, 1999. It has been submitted that the application, being Arbitration Application No. 310 of 2000, was filed by the Department for setting aside the award on April 28, 2000. It is submitted on behalf of the appellant that the application for setting aside the award was filed after lapse of period of four months

from the date of receipt of the award and, therefore, the said application was time-barred and the learned Judge of the City Civil Court had erred in not rejecting the said application as time-barred. It has been further contended that, as far as the language of Section 34 of the Act is concerned, the crucial phrase 'but not thereafter' used in the proviso to sub-section (3) of Section 34 of the Act would amount to an express exclusion within the meaning of section 29(2) of the Limitation Act and would, therefore, bar the application of Section 5 of the Limitation Act. It has been contended that, in spite of the appellant taking specific contention in its application Exh.16 to the effect that the application was time-barred, the learned trial Judge had not taken into consideration the objection raised by the appellant and, therefore, on this ground alone, the appeal deserves to be allowed. Learned counsel for the appellant, in support of the above submission, has placed reliance on the decision of the Supreme Court in the case of Union of India vs. Popular Construction Company, reported in 2001 (3) Arbitration Law Reporter 354 (=2001 (7) Supreme 345). The Supreme Court, in Popular Construction Company (supra), has held as under:

"To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result."

It has been further held as under:

"Here the history and scheme of the 1996 Act support the conclusion that the time limit prescribed under Section 34 to challenge an Award is absolute and unextendable by Court under Section 5 of the Limitation Act. The Arbitration and Conciliation Bill, 1995, which preceded the 1996 Act stated as one of its main objectives the need 'to minimize the supervisory role of courts in the arbitral process' [4(v) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996]. This objective has found expression in Section 5 of the Act which prescribes the extent of judicial intervention in no uncertain terms."

10. Learned Senior Standing Counsel, Mr. D.N.Patel who appeared on behalf of the Department, has contended that the application, being Arbitration Application No.3 of 2000, for setting aside the award of the sole arbitrator was filed inadvertently in the wrong forum, i.e. in the High Court, within the period of limitation

and, when the said application was placed before the Honourable the Chief Justice on March 31 2000, the Honourable the Chief Justice had granted liberty to the Department to approach the competent Civil Court for filing application for setting aside the award and it was directed that, when such application was filed, the competent Civil Court shall take up the application for decision within reasonable time. Learned counsel has, therefore, submitted that the direction given by the Honourable the Chief Justice would make it clear that, when such application was filed, the Court was bound to consider it on merit. Learned counsel has strenuously urged that the arbitrator had travelled much beyond the scope of the terms of the reference and had, virtually, modified the terms of the agreement dated September 15, 1994. It has been submitted by the learned counsel for the Department, that the sole arbitrator had misinterpreted the decision of the Supreme Court in the case of Tata Press (supra). It is further submitted that the appeal preferred by Tata Press was decided by the Supreme Court on August 3, 1995 and the appellant for the first time made representation for modification of the agreement on January 6, 1997, after lapse of a long time. It is further submitted that it could not be contended by the appellant that there was mutual mistake of facts at the time of entering into the agreement for publishing telephone directory with yellow pages. It has been vehemently submitted that the Arbitrator while making the award by modifying the terms and conditions of the agreement had burdened the Department to heavy loss to the effect that they shall purchase the remaining copies from the appellant at the cost price of each copy and ignoring that the appellant was bound to supply copies as agreed to in the agreement. It has been strenuously urged that the sole arbitrator had readily accepted the revised proposal of the appellant of payment of royalty of Rs.1 lakh each year, i.e for the years 1999 and 2000, without giving any opportunity to the Department against the offer made by the appellant after conclusion of the hearing before the sole arbitrator. It has been submitted that the arbitrator had flagrantly violated the principles of natural justice and had passed the award arbitrarily by acceding to the offer made by the appellant without affording an opportunity to the Department to express their opinion about the offer made by the appellant which was made by its letter dated February 17, 1999 after the hearing was concluded by the arbitrator on February 5, 1999. In the light of the above facts and situation, it is contended by the learned counsel that the award of the arbitrator being ex-facie illegal and non-est is liable to be set aside and the

learned trial Judge was justified in allowing the application filed by the Department by setting aside the award. The learned counsel has submitted that the award of the sole arbitrator cannot be called an award in the eye of law and no period of limitation will apply and, therefore, obviously, the decision of the Supreme Court in the case of Popular Construction Company (supra) will have no application to the facts and situation of the present case. It has been submitted that the award being non-est has to be ignored for all time to come and no period of limitation is prescribed for filing application to set aside such an award which is not an award in the eye of law or which is non-est. It has also been submitted that by the impugned award the sole arbitrator had accepted the picture projected by the appellant and had totally ignored the financial implications which were going to affect the revenue of the Department. It has also been submitted that the appellant with a view to wriggle out from its liability to pay royalty as fixed in the agreement, had made out a case that, after the decision of the Supreme Court in the case of Tata Press, the agreement had become non-performable. It has been submitted that the arbitrator could not have reduced the rate of royalty as fixed in the agreement by making it practically 'nil' thereby causing a huge loss to the revenue of the department. Learned counsel has submitted that the trial court was justified in setting aside the award of the sole arbitrator which was made ignoring settled legal principle, and by which award the arbitrator had exceeded his limit and had travelled beyond the scope of the terms of reference, and, hence, the appeal be dismissed with costs.

11. Learned counsel for the appellant, to refute the arguments of learned Senior Standing Counsel, Mr. D.N. Patel, on the merits of the appeal, has submitted that, after the judgment of the Supreme Court in the case of Tata Press, the agreement had become completely non-performable because the monopolistic rights given to the appellant did not remain in existence, and other private contractors were entitled to publish yellow pages without obtaining permission of the Telephone Department. It is submitted that, because of the change brought about by the decision of the Supreme Court in the case of Tata Press, the appellant had made several representations to the Department to modify the terms of the agreement and when the department had not paid any heed to the request of the appellant, it had moved the High Court by filing Special Civil Application No.10658 of 1996 for modification of the terms and conditions of the agreement. It has been submitted that, even after the

direction given by the High Court, when the appellant had made the representation to the department to modify the terms and conditions of the agreement, the said representation has been turned down by the Department, and, therefore, it had to take a resort to file an application for the appointment of an arbitrator as per clause 21 of the agreement. It has been submitted on behalf of the appellant that the agreement dated September 15, 1994 had become impossible to be performed in view of Section 56 of the Indian Contract Act. It has been further submitted that the essential idea upon which the doctrine of 'frustration' is based is that of impossibility of performance of the contract. In fact, 'impossibility' and 'frustration' are often used as interchangeable expressions. The learned counsel for the appellant, in support of the submission that when such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the Court which can pronounce the contract to be frustrated, has placed reliance on the decisions of the Supreme Court in the cases of

(i) Satyabrata Ghose vs. Mugneeram Gangur, reported in AIR 1954 Supreme Court 44;
(ii) Smt. Sushila Devi and another vs. Hari Singh and others, reported in AIR 1971 Supreme Court 1756;
and
(iii) Har Prasad Choubey vs. Union of India, reported in AIR 1973 Supreme Court 2380.

It has been contended that the appellant had never abandoned the work of publication of the telephone directory and had shown its willingness to publish directory even after the contract period was over. It has been further contended that a copy of revised proposal was tendered by the appellant to the Manager of the department and the department had filed its reply to the said revised proposal and, thereafter, the arbitrator had considered all the pros and cons of the revised proposal and had made his award. It has been submitted that the department was given ample opportunity with regard to revised proposal put up by the appellant before the arbitrator. It has been submitted that the sole arbitrator was a Senior Officer of the cadre of General Manager of the Telecom Department who was duly appointed to act as arbitrator by the Department of Telecommunication, New Delhi. The sole arbitrator was an experienced officer of the department who had taken into consideration all the facts and circumstances with regard to agreement having become non-performable in view of the

decision of the Supreme Court in the case of Tata Press and, therefore, had directed the appellant to publish remaining two issues of directory for the years 1999 and 2000 by reducing payment of royalty and by curtailing free copies taking into consideration the cost of paper and printing charges. It has been further submitted that when the appellant had filed Arbitration Application No.14 of 1998 in the High Court for appointment of arbitrator as per clause 21 of the agreement, no objection was raised by the department and the Department of Telecommunication had also agreed to appoint respondent No.2 as sole arbitrator to resolve the dispute between the appellant and the department with regard to the publication of directory. It has been submitted that, since the sole arbitrator had given the award which is against the department, it is not open for the department now to contend that the award of the arbitrator is against the provision of law and is non-est.

12. The dispute, with regard to publication and printing of the telephone directory with yellow pages, arose after the decision of the Supreme Court in the Tata Press case. At the time when the agreement was entered into between the Department and the appellant, i.e. on September 15, 1994, the litigation between Mahanagar Telephone Limited and Tata Press was already pending in the High Court of Bombay. The decision of the High Court of Bombay was already challenged before the Supreme Court. The appellant very well knew the pros and cons of entering into the agreement more particularly the terms and conditions and the royalty and other charges to be paid to the Department. The main thrust of the argument of the learned Senior Advocate for the appellant is that, as the agreement had become non-performable, because of the decision of the Supreme Court in Tata Press case, the contract had become frustrated. In this connection, the learned Senior Advocate for the appellant has placed reliance on Section 56 of the Indian Contract Act, 1872, which reads as under:

"56 Agreement to do impossible act -
An agreement to do an act impossible in itself is void.
Contract do act afterwards becoming impossible or unlawful -
A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes

void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful -

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

13. In deciding the cases in India, the only doctrine we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Indian Contract Act, taking the word 'impossible' in its practical and not literal sense. In Satyabrata Ghose case (supra), the Supreme Court held that Section 56 was exhaustive and that importing the English law de hors the statutory provisions is not permissible. In Naihati Jute Mills Limited vs. Khyaliram Jagannath, AIR 1968 Supreme Court 522, it is ruled that the theories of the doctrine of 'frustration' have been evolved to adopt a realistic approach to the problem of performance of contract when it is found that owing to causes unforeseen and beyond the control of the parties intervening between the date of the contract and the date of its performance it would be both unreasonable and unjust to exact its performance in the changed circumstances. The necessity of evolving one or the other theory was due to the common law rule that courts have no power to absolve party to the contract from his obligation. On the other hand, they were anxious to preserve intact the sanctity of contract while on the other, the courts could not shut their eyes to the harshness of the situation in cases where the performance became impossible by causes which could not have been foreseen and which were beyond the control of parties. Such difficulty has, however, not to be faced by courts in this country. In Ganga Saran vs. Firm Ram Charan Ram Gopal, AIR 1952 Supreme Court 9, the Supreme court emphasized that so far as the courts in this country are concerned they must look primarily to the law as embodied in sections 32 and 56 of the Contract Act. In Satyabrata Ghose vs. Mugneeram Bangur & Co., AIR 1954 Supreme Court 48, the Supreme Court stated that Section 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of parties.

14. When the agreement was entered into by the parties, the dispute between Tata Press and Mahanagar Telephone Limited was pending and the outcome was not

known to either of the parties. Tata Press had already lost its case before the Division Bench in the Bombay High Court. However, the matter was carried further to the Supreme Court. The appellant having known the result of the litigation had entered into the agreement with the Department. A huge amount of royalty was agreed to be paid to the Department and a large number of copies were agreed to be supplied free of cost to the Department to be circulated to the subscribers. By the decision of the Supreme Court in Tata Press case, the monopolistic rights given to the appellant came to be derecognized. It requires to be stated that, even after the decision of the Supreme Court in Tata Press case, the appellant had not lost the right to publish Tata yellow pages. By the decision of the Supreme Court in Tata Press case, to get advertisement in yellow pages had only become competitive. In our opinion, it cannot be said that, by the decision of the Supreme Court in Tata Press case, the agreement had become frustrated and non-performable. The appellant having realised that it would not be profitable to publish telephone directories with yellow pages after the decision of the Tata Press, it had tried to wriggle out by filing litigation after litigation for modification of the terms and conditions of the agreement. The court, to do justice between the parties, has to look to the interest of both the parties. The Department would also lose a huge amount of royalty, which was agreed to be paid by the appellant for publication of the telephone directory with yellow pages, if the terms and conditions were modified. When the parties with open eyes and with all its result, had agreed to the terms and conditions embodied in the agreement, the appellant cannot contend that, by the decision of the Supreme Court in Tata Press case, the contract had become non-performable due to doctrine of frustration as embodied in Section 56 of the Contract Act. In our opinion, even after the Tata Press case, the performance of the contract had not become impossible.

15. The challenge for setting aside the award of the Arbitrator by the Department on the ground that the Arbitrator had not followed the procedure properly and after conclusion of the arguments had virtually accepted the offer of the appellant without affording an opportunity of hearing to the Department, and had made his award on the basis of that offer, deserves consideration. It is also borne out from the record that the arguments were concluded before the Arbitrator on February 5, 1999 and, thereafter, the appellant had given an offer to the Arbitrator, against which, the Department had filed their objection. It would have been proper for

the Arbitrator to have afforded an opportunity of being heard to the new offer made by the appellant. Without following this procedure, the Arbitrator gullibly had accepted the offer made by the appellant in toto and based his award on it. The Arbitrator had also extended the period of publication of telephone directory to 1999-2000 which could not have been done in view of the fact that the agreement was only entered into for publication of telephone directory with yellow pages from 1994 to 1998. Extending the period of publication of telephone directory beyond 1998 was also against the terms of reference. By the impugned award, the sole arbitrator had given full benefit and exemption to the appellant from paying royalty and from supplying free copies of telephone directory with yellow pages without considering the difficulties faced by the Department and the subscribers of not getting facilities of telephone directory from 1996 onwards. By passing the impugned award, the Department was saddled with a huge loss of royalty to be recovered from the appellant. The Arbitrator had not acted judicially and had ignored the fact that a huge loss was likely to be caused to the revenue of the Government by passing such an unjust and inequitable award in favour of the appellant.

16. In our view, the application for setting aside award filed by the Department satisfied the ingredients of Section 34 of the Act. Therefore, the trial court was justified in allowing the application on merits by quashing the award of the sole arbitrator, respondent No.2.

17. The respondent-Department has got a good case on merit and they have valid grounds for setting aside the award made by the sole arbitrator, but, for the reasons best known to the Department, the application for setting aside the award under Section 34 of the Act was not filed within the limitation prescribed by sub-section (3) of section 34 of the Act. We are at pain to note that an application, being Arbitration Petition No. IAAP/3/2000, for setting aside the award was filed before the Honourable the Chief Justice of this Court within the period of limitation and, when the Honourable the Chief Justice found that the application was incompetent, the department was directed to file an application in the competent Civil Court. In spite of the order of the Honourable the Chief Justice dated March 31, 2000, the Department did not file the application for setting aside the award immediately i.e. within the maximum period of four months from the date of passing of the award of the Arbitrator. As per the principle laid down by the

Supreme Court in the case of Popular Construction Company (supra), in no circumstances, application for setting aside the award under Section 34(3) of the Act can be entertained beyond the prescribed period provided and the delay caused in filing the said application cannot be condoned under Section 5 of the Limitation Act. Even though the appellant had raised the objection by filing an application Exh.16 before the City Civil Court, the City Civil Court had conveniently ignored the said objection raised by the appellant that the application for setting aside the award was time-barred. Even though the Department has a good case on merits to set aside the award of the sole arbitrator, but, as the application was time-barred, the City Civil Court has erred in allowing the application without considering the objection raised by the appellant with regard to limitation. Even though the Department had good grounds in their favour for setting aside the award, it had allowed the limitation to expire by not filing an application for setting aside the award, for which lapse, a serious note is required to be taken against the officers and the responsible persons of the Department. The dispute involved in the present appeal concerns a huge loss to the revenue for which the Department should have been vigilant to agitate their grievance in the competent court against the award of the sole arbitrator. In the facts and circumstances of the present case, in our opinion, we have no other alternative, but to hold that, because of the pronouncement of the judgment of the Supreme Court in the case of Popular Construction Company (supra), the application filed to set aside the award of the sole arbitrator was time-barred. Therefore, we hold that the trial court had erred in entertaining the time-barred application in view of the provisions of sub-section (3) of Section 34 of the Act.

18. As a result of foregoing discussion, this appeal is allowed. The judgment and order dated March 27, 2001 passed by the learned Judge, Court No.12, City Civil Court, Ahmedabad, in Arbitration Application No.310 of 2000, is quashed and set aside. There shall be no order as to costs.

19. In view of the order passed in the First Appeal, Civil Application No.4986 of 2001 stands disposed of accordingly, with no order as to costs.

February 15, 2002 (M.H. Kadri, J.)

(H.H. Mehta, J.)

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(swamy)